NO. 49762-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DARRELL D. CLASSEN

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable David E. Gregerson, Judge

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# BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Darrell Classen's actions underlying his kidnapping in the first degree and attempted kidnapping in the first degree convictions constituted one offense, violating double jeopardy protection.

2. Classen's lawyer provided ineffective assistance of counsel in failing to request a voluntary intoxication instruction.

3. Classen's lawyer provided ineffective assistance of counsel when he failed to request a lesser included offense instruction on assault in the fourth degree as to Count IV.

4. The $200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) violates equal protection.

5. The trial court should have inquired as to Classen's ability to pay the $200 criminal filing fee under RCW 36.18.020(2)(h) before imposing it.

Issues Pertaining to Assignments of Error

1a. Is kidnapping a course of conduct crime?

1b. Did Classen's actions constitute one course of conduct, rendering his convictions for kidnapping in the first degree and attempted kidnapping in the first degree violative of the principles of double jeopardy?

2. Did defense counsel render ineffective assistance of counsel in failing to request a voluntary intoxication instruction?

3. Did defense counsel render ineffective assistance of counsel in failing to request a lesser included offense instruction on assault in the fourth degree as to Count IV?

4. Criminal defendants and civil litigants are similarly situated with respect to the purpose of court filing fees, which is to fund counties, county and regional law libraries, and the state general fund. Courts may waive filing fees for civil litigants, but the Court of Appeals has held that the court may not waive filing fees for criminal litigants. Given that there is no rational basis for this differential treatment when considering the purpose of the filing fee statute, does the mandatory imposition of the $200 criminal filing fee violate equal protection?

5. Given the plain language of RCW 36.18.020(2)(h), the differences in text between RCW 36.18.020(2)(h) and other provisions of RCW 36.18.020(2)(h), the differences between RCW 36.18.020(2)(h) and other statutes imposing mandatory legal financial obligations, and the similarities between RCW 36.18.020(2)(h) and another statute requiring a defendant "shall be liable" for discretionary legal financial obligations, is the $200 criminal filing fee a waivable, discretionary legal financial obligation?

B. STATEMENT OF THE CASE

The state charged Mr. Classen with one count of felony harassment with a deadly weapon enhancement, one count of kidnapping in the first degree with a deadly weapon enhancement, two counts of assault in the second degree against two separate individuals, and one count of attempted kidnapping in the first degree. CP 27-28.

These charges arose from allegations that Classen held Crista Cole hostage in her car for an extended period of time and threatened to slit her throat, beginning in Oregon and eventually ending just over the Oregon/Washington state border in Washington, assaulted her in an attempt to kidnap her again once she escaped, and assaulted a bystander with intent to kidnap the bystander. RP 74-110, 234-36.

Prior to trial, Classen was evaluated by Dr. C. Kirk Johnson of the Vancouver Guidance Clinic to assist in determining his competency to proceed with the case. CP 30-34. Dr. Johnson noted a diagnosis of Amphetamine Use Disorder. CP 31. Recent Multnomah County records noted that Classen reported daily use of injectable methamphetamine, heroin use, and some oxycodone use. CP 32. To Dr. Johnson, Classen denied any history of such use, which Dr. Johnson did not consider a credible report. RP 33.

Regarding the events of September 5, 2015, Classen indicated to authorities that he did not remember what happened. CP 31. Classen told Dr. Johnson that "[t]here was no kidnapping. . . . Maybe an assault four." CP 31. Classen told Dr. Johnson that he only recalled "waking up in the back of a car." CP 32.

In support of its charges of felony harassment, kidnapping in the first degree, first count of assault in the second degree, and attempted kidnapping in the first degree, the State presented Crista Cole. RP 74-110. Cole testified that she had known Classen for a year and that on September 5, 2015, she asked if she could give him a ride somewhere. RP 76, 79, 103. Classen asked her to drive him down the street. RP 79. Classen, who was seated in the passenger seat of Cole's car, did not get out of the car and began to poke Cole and grab her hair while she was driving. RP 81-82. He was "yammering," "talking to himself," and "saying a bunch of stuff that didn't really make sense at the time." RP 82. Classen accused Cole of being a "cop" and a "fed." RP 82. Classen had never acted unusually around her before. RP 103.

Classen used duct tape to secure Cole's hands to the steering wheel. RP 86-87. He cut her hair with scissors he found in the car. RP 86. Classen told Cole he was going to slit her throat. RP 89. In northeast Portland he began to hit her. RP 84. He also cut her with the scissors. RP 91.

Cole began to travel north on Interstate 205 in Oregon. RP 93-94. She crossed "the bridge" and her car began to run out of gas. RP 95. Cole pulled the car over to the roadside "a little bit past Government Island." RP 95-96. Classen was still hitting Cole and making threats. RP 96. Cole propped open her car door, ran out of the vehicle, and tried to get someone to help her. RP 97, 99. Classen also got out of the vehicle and ran after Cole, pushing her down. RP 99. He continued to chase Cole until bystanders were able to stop him. RP 101.

The state presented other witnesses. Mr. Morales Martinez testified that he was driving north on I-205, still on "the bridge" before SR 14, when he saw a woman asking for help and a man trying to grab her. RP 113-14, 116. He saw the man grab the woman and push her against his truck's side mirror. RP 114-15. He helped separate them and restrain the man. RP 115. Mr. Thomas testified that he was driving north on I-205 from Portland, Oregon. RP 130-31. Traffic was at a standstill from "the exit of 205 to Highway 14." RP 131. He saw a man hit a woman and got out of his car, eventually tackling the man. RP 132, 135. The man "wasn't very coherent." RP 135. Classen "kept saying odd things, like, 'I'm going to live my life.' And he would count to five and try to get up." RP 135.

Sergeant Blaise Gedry testified that he responded to the scene at I-205 and SR 14, in Washington State. RP 175-76. He was one of the last

police officers to arrive. RP 176. Cole was already in an ambulance. RP 177. He observed scissors on the dashboard of Cole's vehicle. RP 178. Classen was in custody in the back of a patrol vehicle. RP 178. He was able to observe Classen from directly outside of the patrol vehicle window. RP 179. Gedry testified that he has a significant amount of contact with people who are under the influence of various types of intoxicants and that he has come to recognize certain signs that people exhibit when they are under the influence. RP 180. He saw that Classen's muscles were twitching, he was smacking his lips as if extremely thirsty, he was nonresponsive to questions, was making "weird nonsensical statements," and "odd types of noises." RP 180. He testified that it appeared to him that Classen was under the influence. RP 180.

The state admitted a Google map and a color aerial view of the Washington-Oregon border. RP 203. Gedry testified that the border between the states was marked by a dotted line. RP 203. He pointed with a laser to the approximate location of the "scene that you went to where you saw Ms. Cole and the defendant." RP 203. He testified that the distance from the state line to "that location" was 2,666.65 feet. RP 204. He testified that the incident occurred "just as it is turning into the SR 14 exit ramp." RP 204. He clarified on cross-examination that there was over 2,000 feet from the state line to the location where the vehicle was parked. RP 206.

Eva Scherer testified that on the day in question she was driving northbound on I-205 and noticed a vehicle pulled over just north of the bridge. RP 228. She saw a man chasing a woman and grabbing her. RP 231. Scherer assisted the woman and the man, Classen, then approached Scherer. RP 234. Classen was "talking and talking and talking." He appeared very agitated and was hard to understand. RP 234. He made several references to being an undercover cop, and that [Cole] was his test subject and he needed her back." RP 234. Classen then said that he would take Scherer instead and told Scherer to get in the car. RP 235. Then, "out of nowhere," Classen slapped her with an open hand. RP 236.

Defense did not request a voluntary intoxication instruction. Defense did not request a lesser-included assault in the fourth degree instruction for either count of assault in the second degree. Defense did not present testimony or elicit testimony from the state's witnesses that Classen did not remember what happened on the day in question.

The prosecutor argued that "what we have here is a man that's out of control; extremely dangerous; high; and determined to hurt, terrorize, and control Crista." RP 289. He argued that Classen assaulted Scherer "to further his crime of kidnapping." RP 296.

During a very brief closing, defense counsel said: "Is Mr. Classen guilty or not guilty? He is guilty of assault. There is no question about that. What kind of assault is it? That's the question." RP 300.

The jury returned guilty verdicts on all five counts. CP 68-72.

At sentencing, the court imposed 51 months on Count V (attempted kidnapping in the first degree) and ran that time consecutive. RP 349; CP 83. The court imposed 15 months on count IV (assault in the second degree – Scherer) and also ran that time consecutive. RP 349. In total, Classen was sentenced to 240 months in prison. RP 349; CP 82.

Defense asked the court to consider Classen's indigency. RP 351. Without so considering, the court agreed to waive "discretionary items." RP 352. The trial court imposed a $200 criminal filing fee. CP 84.

Classen timely appeals. CP 97.

## C. ARGUMENT

### 1. CLASSEN'S ACTIONS UNDERLYING HIS KIDNAPPING IN THE FIRST DEGREE AND ATTEMPTED KIDNAPPING IN THE FIRST DEGREE CONVICTIONS CONSTITUTED ONE OFFENSE, VIOLATING THE PROHIBITIONS ON DOUBLE JEOPARDY

The double jeopardy clauses of the state and federal constitutions guarantee that no person will be placed twice in jeopardy for the same offense. U.S. CONST. amend. V; CONST. art. I, § 9. A constitutional

challenge may be raised for the first time on appeal. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). A court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. State v. Nyasta, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012).

What double jeopardy analysis applies depends on whether the convictions at issue are under the same statutory provision or different statutory provisions. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). The "unit of prosecution" analysis applies when a defendant has multiple convictions under the same statutory provision. Id. Where one crime is a lesser included charge of the other crime, it is appropriate to apply the unit of prosecution test. Id. at 982. An attempted crime is a lesser included offense of the crime charged. State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37 (1992). The unit of prosecution analysis asks what act or course of conduct the Legislature has defined as the punishable act. Id.

a. Kidnapping is a course of conduct crime

Classen was convicted of violating RCW 9A.40.020 which states, "A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent to . . . inflict bodily injury on him or her; or . . . to inflict extreme mental distress on him, her, or a third person." He was also convicted of attempted kidnapping in the first degree pursuant to

RCW 9A.28.020 which states, "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." As an attempted crime is a lesser included offense of the crime itself, the unit of prosecution analysis applies here. Gallegos, 65 Wn. App. at 234; Villanueva-Gonzalez, 180 Wn.2d at 982.

Whether state double jeopardy protection is violated is dependent upon what act or course of conduct the Legislature intended as a punishable "unit of prosecution." Villanueva-Gonzalez, 180 Wn.2d at 982. To glean legislative intent, courts look to the language of the statute itself; if that language is not clear as to whether the crime is a course of conduct offense or a separate act offense, courts have looked to the common law definition of the crime. Remaining ambiguity should be construed in favor of lenity. Adel, 136 Wn.2d at 634–35.

The key phrase describing the nature of the act is the "intentional abduct[ion]" of an individual. RCW 9A.40.020. On its face, the language would appear to indicate that the crime of kidnapping continues for as long as the intentional abduction does. At least one Washington Court has found kidnapping to be a course of conduct crime. See State v. Dove, 52 Wn. App. 81, 88, 757 P.2d 990 (1988) (evidence sufficient to sustain kidnapping conviction where defendant did not participate in victim's abduction but

aided in the recovery of ransom because kidnapping is continuously committed for as long as detention lasts). The Maryland Court of Appeals has come to a similar conclusion ("because kidnapping involves interfering with the victim's liberty, it continues until that liberty is restored"), as has the Court of Appeals of Arizona ("kidnapping is a continuing crime") and the Supreme Court of Tennessee ("the General Assembly intended for this offense to sanction a continuing course of conduct"). State v. Stouffer, 352 Md. 97, 114, 721 A.2d 207 (1998); State v. Jones, 185 Ariz. 403, 407, 916 P.2d 1119 (Ct. App. 1995); State v. Legg, 9 S.W.3d 111, 117 (Tenn. 1999). Kidnapping is a course of conduct crime given the statutory language at issue, Washington precedent, and general consensus of courts across the country.

b. Classen's actions constituted one course of conduct, and thus his conviction for kidnapping in the first degree and attempted kidnapping in the first degree violate double jeopardy

Whether an act of kidnapping and an act of attempted kidnapping constitute one course of conduct depends on the totality of the circumstances. Villanueva-Gonzalez, 180 Wn.2d at 985. The court should take into account the length of time over which the acts took place, whether the acts occurred in the same location, the defendant's intent or motivation for the different acts, whether the acts were uninterrupted or whether there

were any intervening acts or events, and whether there was an opportunity for the defendant to reconsider his actions. Id. No one factor is dispositive. Id.

Based on the totality of the circumstances, Classen's acts constituted one course of conduct. First, the actions for which he was charged—kidnapping Cole in her vehicle (in Washington) and running after her and grabbing her after she ran from the vehicle—took place in the same location. Cole and Classen had only been in Washington State for 2,666.65 feet when Cole's vehicle ran out of gas, and the basis for the state's first degree kidnapping charge was the intentional abduction that occurred in Washington. RP 204; CP 53. The basis for the state's attempted first degree kidnapping charge was the pursuit and grabbing of Cole when she ran from the car, again occurring 2,666.65 feet from the state line. RP 114, 204. Second, these actions took place over a short time period—only long enough for Cole to run from Classen before Classen chased and grabbed her. RP 114-15, 121-22. Third, Classen's intent, according the state, was the same in both instances: to abduct Cole with the intent to inflict bodily injury on her or to inflict extreme mental distress. CP 27-28. While Cole ran from the vehicle, Classen quickly made contact with her again—Martinez testified that Classen was trying to grab Cole before Martinez was able to assist and restrain Classen. RP 114-15. Finally, there is nothing in the record indicating

a lapse in time where Classen had the opportunity to reconsider his actions before chasing after Cole.

Classen's actions which lead to convictions of kidnapping in the first degree and attempted kidnapping in the first degree consisted of a single course of conduct aimed at abducting Cole. Those two convictions arising out of that conduct violate double jeopardy principles. This court must reverse and remand with instructions to vacate the lesser punished crime, attempted kidnapping in the first degree, for which Classen was sentenced to 51 months consecutive time. RP 349; CP 83. See State v. Schwab, 163 Wn.2d 664, 675, 185 P.3d 1151 (2008) (noting with approval the holding of this court in a prior case where the court "vacated the lesser conviction where convictions for both first degree manslaughter and second degree felony murder violated double jeopardy").

2. CLASSEN'S LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION

Defense counsel rendered ineffective assistance of counsel in failing to request a voluntary intoxication instruction when each crime with which Classen was charged included a mental state, there was substantial evidence of intoxication, and there was evidence that the intoxication affected

Classen's ability to form the requisite intent or mental state. State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003).

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). While performance is not deficient if it can be characterized as legitimate trial strategy or tactics, performance is not reasonable where there is no conceivable legitimate tactic explaining counsel's actions. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260, 1269 (2011). Prejudice exists if there is a reasonable probability that the outcome would have been different but for counsel's deficient performance, and that probability is sufficient to undermine confidence in the outcome. State v. Estes, ___Wn.2d ___, ___P.3d___, 2017 WL 2483272, at *3 (June 8, 2017).

a. Defense counsel's performance was deficient because Classen was entitled to a voluntary intoxication instruction

Classen was entitled to a voluntary intoxication instruction and there was no conceivable legitimate tactic to explain defense counsel's failure to request one. In Kruger, the defendant showed up to a woman's home and refused to leave. 116 Wn. App. at 688. The woman called the police. Id. Kruger did not listen to police when they arrived and attempted to strike one officer with a beer bottle. Id. at 689. When a struggle ensued, Kruger head-butted the officer. Id. Officers attempted to subdue Kruger and used pepper spray, which had little effect. Id. At jail, Kruger vomited and was taken to the hospital. Id. Kruger was charged with and convicted of third degree assault. Id. On appeal, Kruger argued that his attorney was ineffective in failing to request a voluntary intoxication instruction. Id. at 690. The court found that the charge of assault included a mental state, that Kruger was entitled to the instruction, that counsel should have requested the instruction, and that Kruger had established prejudice. Id. at 691-95. The conviction was reversed and the matter remanded for a new trial. Id. at 695.

This case requires the same disposition. Like Kruger, each of the state's five charges against Classen included a mental state. Id. at 691.[1]

[1] Count I: "Knowingly threaten"
Count II: "Intentionally abduct"
Count III: "Intentional touching or striking"

Under Kruger, therefore, "a voluntary intoxication instruction may well have been warranted." Id. at 692. Like Kruger, there was substantial evidence of intoxication. Officer Gedry testified that Classen appeared to be under the influence and the state argued in closing that Classen was high and "out of control." RP 289.

Like Kruger, there was evidence reasonably and logically connecting Classen's intoxication with an inability to form the required level of culpability to commit the crime charged. Id. at 691-92. Cole testified that she had known Classen for a year and that he had never acted unusually around her. RP 76, 103. This testimony is corroborated by the fact that Cole invited Classen into her vehicle and offered to give him a ride. RP 79. Once in her vehicle, however, Classen was yammering, talking to himself, and "saying a bunch of stuff that didn't really make sense at the time." RP 82. Classen accused Cole of being a "cop" and a "fed." RP 82. Thomas, who encountered Classen for the first time on I-205, testified that Classen was not very coherent and "kept saying odd things, like, 'I'm going to live my life.'" RP 135. Thomas testified that Classen was counting to five. RP 135. Scherer testified that Classen was "talking and talking and talking," appeared very agitated, and was hard to understand. RP 234. Classen referenced being an

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Count IV: "Intentional touching or striking"
Count V: "With intent to commit kidnapping in the first degree"
CP 45, 49, 53, 57, 58.

undercover cop, said that Cole was his test subject, and that he needed to get her back. RP 235.

Sergeant Gedry's observations and opinion of Classen's state most clearly connect Classen's intoxication with an inability to form the required level of culpability to commit the crimes charged. Gedry was able to observe Classen from directly outside of the patrol vehicle window. RP 179. He testified that he has a significant amount of contact with people who are under the influence of various types of intoxicants and that he has come to recognize certain signs that people exhibit when they are under the influence. RP 180. He saw that Classen's muscles were twitching, he was smacking his lips as if extremely thirsty, he was nonresponsive to questions, and he was making "weird nonsensical statements," and "odd types of noises." RP 180. He testified that it appeared to him that Classen was under the influence. RP 180.

Defense counsel did not present testimony from Dr. Johnson that Classen's file review and recent history suggested a current diagnosis of Amphetamine Use Disorder, that Classen recently reported injecting methamphetamine and heroin daily, or that his only recollection from the day in question is waking up in the back of a car. CP 32, 34. Defense counsel did not elicit testimony from any state witnesses that Classen claimed not to remember his behavior on the day in question. CP 31.

As the record reflects substantial evidence of Classen's level of intoxication, which escalated to the point that he was paranoid, delusional, and nonresponsive, Classen was entitled to a voluntary intoxication instruction. Kruger, 116 Wn. App at 692. Where there is sufficient testimony from which the jury could infer the absence of intent due to the defendant's intoxication, it is error to not give the instruction. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

Classen's only plausible defense as to all five charges against him was an inability to form the requisite intent or mental state. There is no conceivable explanation for defense counsel's omission. Nearly every witness testified as to Classen's intoxication or referred to observations related to intoxication. No one downplayed his intoxication. Counsel's deficient performance in this regard is emphasized by his failure to present evidence of Classen's drug use issues or his inability to remember events that took place on the day in question. Even without that information, however, there was sufficient evidence to permit a jury to consider the question of Classen's ability to form the requisite mental states considering his intoxication, and defense counsel's failure to request the instruction constituted deficient performance.

b. Classen was prejudiced when his defense counsel failed to request a voluntary intoxication instruction

The jury was instructed on the elements of all five counts, including intent and knowledge. Classen's intoxication was repeatedly brought to the jury's attention throughout trial. However, the jury was not instructed that intoxication could be considered in determining whether Classen acted with the mental state essential to commit the crime. Without this instruction the jury was not correctly apprised of the applicable law. As prejudice exists if there is a reasonable probability that the outcome would have been different but for counsel's deficient performance, Classen was prejudiced when defense counsel failed to present the jury with the instruction despite extensive testimony regarding Classen's intoxication and its effects. Because defense counsel's performance was deficient and that deficiency prejudiced Classen, this court should reverse and remand for a new trial.

3. CLASSEN'S LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO REQUEST A LESSER INCLUDED OFFENSE INSTRUCTION ON ASSAULT IN THE FOURTH DEGREE AS TO COUNT IV

Defense counsel rendered ineffective assistance of counsel when he failed to request a lesser include offense instruction on assault in the fourth degree as to count IV, despite arguing in closing the Classen had committed assault in the fourth degree. Again, to establish a claim for ineffective

assistance counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland, 466 U.S. at 687.

a. Defense counsel's performance was deficient because Classen was entitled to a lesser included offense instruction and there was no legitimate trial strategy or tactic explaining defense counsel's failure to request it

As Classen was entitled to a lesser included offense instruction, defense counsel's performance was deficient in failing to request it. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); Grier, 171 Wn.2d at 42. During his brief closing argument, defense counsel stated: "Is Mr. Classen guilty or is he not guilty? He is guilty of assault. There is no question about that. What kind of assault is it? That's the question." RP 300. Defense counsel inexplicably invited jurors to find his client guilty of some lesser form of assault without giving them the tools to do so through a lesser included instruction. No reasonable tactic can explain this decision.

Under the Workman test, a defendant is entitled to a lesser included offense instruction if each of the elements of the lesser offense is a necessary element of the greater offense and if the evidence supports an inference that only the lesser offense was committed. Workman, 90 Wn.2d at 447-48. A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . with intent to commit a felony, assaults another. RCW 9A.36.021(1)(e). A person is guilty

of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another. RCW 9A.36.041. Each of the elements of assault in the fourth degree is a necessary element of assault in the second degree, satisfying the first prong of the Workman test.

Evidence presented at Classen's trial was sufficient to support at least an inference that Classen only committed a fourth degree assault as to Scherer. The state relied on 9A.36.021(1)(e)—"with intent to commit a felony, assaults another"—to elevate the assault charges to second degree. CP 27-28. The state argued that Classen committed the assault with the intent to kidnap Scherer. CP 27-28.

When the defendant approached Scherer, he seemed fixated on Cole. RP 234. He said he needed to get Cole back and then said he would take Scherer instead. RP 235. Classen hit Scherer with an open hand and bystanders subdued him. RP 133, 236. While he told Scherer he would "take" her, Classen made no attempt to grab or overtake Scherer in order to abduct her. In contrast, Classen did push Cole down when he was chasing her, apparently in an attempt to kidnap her. Evidence presented as to count IV, assault in the second degree against Scherer, was sufficient to support at least an inference that only assault in the fourth degree was committed.

There is no conceivable tactic or strategy to explain defense counsel's failure to request a lesser included instruction. In Grier, the court held that the defendant had not established that defense counsel's performance was deficient in failing to request a lesser included instruction because "an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal." 171 Wn.2d at 42. Grier could have been willing to forgo the lesser included instruction and take the risk of being convicted of the greater offense in order to get the benefit of being acquitted altogether. Id. The court reasoned that Grier and his attorney could have believed that an all or nothing strategy was the best approach because Grier's attorney argued that Grier had not committed an assault at all. Id. at 43-44.

In stark contrast to Grier, Classen's defense counsel's strategy was apparently to tell jurors that his client was indeed guilty of assault. RP 300. The only question, defense counsel wondered, was "what kind of assault is it?" RP 300. The instructions, however, only detailed one "kind" of assault—assault in the second degree. CP 55-58. There is no conceivable legitimate tactic explaining defense counsel's invitation to jurors to convict his client of crime the jury had not been instructed on. Defense counsel's failure to request the appropriate instruction constituted deficient performance.

b. Classen was prejudiced when his defense counsel failed to request a lesser included offense instruction

Counsel's deficient performance prejudiced Classen. Prejudice exists if there is a reasonable probability that the outcome would have been different but for counsel's deficient performance, and that probability is sufficient to undermine confidence in the outcome. Estes, 2017 WL 2483272, at *3. A "reasonable probability" is a less demanding standard than preponderance of the evidence. Id.

There is at least a reasonable probability that jurors would have found Classen guilty of assault in the fourth degree instead of assault in the second degree as to count IV. Unlike his intent to kidnap Cole and actions in furtherance of that goal, Classen's assault of Scherer was not clearly committed in furtherance of his attempt to kidnap her. Counsel's invitation to jurors to convict his client of assault in the second degree exposed Classen to a standard range of 63 to 84 months as opposed to the maximum sentence of 12 months for assault in the fourth degree. CP 81. Classen was actually sentenced to 15 months on count IV, run consecutive. RP 349.

Within a reasonable probability, counsel's deficient performance in failing to request a lesser included instruction and inviting jurors to convict his client of assault prejudiced Classen. Because Classen received ineffective

assistance of counsel, this court should reverse and remand for a new trial as to count IV.

4. THE "MANDATORY" IMPOSITION OF THE $200 CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION GIVEN THAT SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER

"'Under the equal protection clause of the Washington State Constitution, article [I], section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.'" State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (alteration in original) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)). When a fundamental right or constitutionally cognizable suspect class is not at issue, "'a law will receive rational basis review.'" Id. at 308 (quoting State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). No fundamental right or suspect class is at issue here, so a rational basis requires that the legislation and the differential treatment alleged be related to a legitimate governmental objective. In re Det. of Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The purpose of RCW 36.18.020 is the collection of revenue from filing fees paid by both civil and criminal litigants to fund counties, county or regional law libraries, and the state general fund. See RCW

36.18.020(1) ("Revenue collected under this section is subject to division with the state under RCW 36.18.025 and with the county or regional law library fund under RCW 27.24.070 . . . ."). RCW 36.18.025 requires 46 percent of filing fee monies collected by counties to "be transmitted by the county treasurer each month to the state treasurer for deposit in the state general fund." RCW 27.24.070 requires that $17 or $7, depending on the type of fee involved, be deposited "for the support of the law library in that county or the regional law library to which the county belongs." Civil and criminal litigants who pay filing fees under RCW 36.18.020 are similarly situated with respect to the statute's purpose: their fees are plainly intended to fund counties, county or regional law libraries, and the state general fund.

Although similarly situated, criminal and civil litigants are treated differently without any rational basis for different treatment considering the purpose of RCW 36.18.020. Civil litigants may obtain waiver of their filing fees. The comment to GR 34 directly states as much:

> This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); . . . domestic violent prevention

surcharges established pursuant to RCW 36.18.020(2)(b)

. . . .

(Emphasis added.) Civil litigants have no constitutional right to access the courts. Criminal litigants do. Yet, according to State v. Gonzales, 198 Wn. App. 151, 154-55, 392 P.3d 1158 (2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), and State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), civil litigants may obtain waivers of their filing fees and criminal litigants may not. Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection. Classen asks this court to strike the RCW 36.18.020(2)(h) $200 criminal filing fee under the state and federal equal protection clauses.

5. THE $200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO CLASSEN'S ABILITY TO PAY BEFORE IMPOSING IT

The trial court imposed a $200 criminal filing fee. CP 84. Because this fee is discretionary, not mandatory, the trial court erred in imposing it without first conducting an adequate inquiry into Classen's financial conditions and ability to pay.

Classen recognizes that Divisions Two and Three have held that the filing fee listed in RCW 36.18.020(2)(h) is a mandatory legal financial obligation. See Stoddard, 192 Wn. App. at 225; Lundy, 176 Wn. App. at 102. More recently, Division Two, when challenged on the point that Lundy does not contain reasoned statutory analysis, concluded that RCW 36.18.020(2)(h) was mandatory simply because the statute contains the word "shall." Gonzales, 198 Wn. App. at 155.[2]

The Gonzales court's statutory analysis was not reasoned but overly simplistic. The same goes for Lundy and Stoddard, neither of which contained even an attempt at statutory analysis. Lundy, 176 Wn. App. at 102 (giving an unanalyzed proposition that "the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing" the criminal filing fee); Stoddard, 192 Wn. App. at 225 (relying on Lundy for the one-sentence proposition that RCW 36.18.020(2)(h) "mandate[s] the fees regardless of the defendant's ability to pay"). These decisions misapprehend the meaning of the word "liable" and overlook the differences in text between RCW 36.18.020(2)(h) and the statutes providing truly mandatory LFOs, the differences in text between RCW 36.18.020(2)(h) and the other provisions of RCW 36.18.020(2), and at least one other criminal statute that

[2] Undersigned counsel has filed a petition for review in Gonzales in hopes to resolve the issue once and for all.

provides a convicted defendant "shall be liable" for all costs of the proceedings against him or her. This court should hold that the $200 criminal filing fee provided in RCW 36.18.020(2)(h) is discretionary, not mandatory.

a. The word "liable" does not denote a mandatory obligation

By directing that a defendant be "liable" for the criminal filing fee, the legislature did not create a mandatory fee. The term "liable" signifies a situation in which legal liability might or might not arise. Black's Law Dictionary confirms that "liable" might make a person obligated in law for something but also defines liability as a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990); see also WEBSTER'S THIRD NEW INT'L DICTIONARY 1304 (1993) (defining liable as "exposed or subject to some usu. adverse contingency or action : LIKELY"). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

In Gonzales, Division Two reasoned that because the statute states "shall be liable," it "clarifies that there is not merely a risk of liability" given that the word "shall" is mandatory. 198 Wn. App. at 155. This clarifies nothing, however, because it ignores the meaning of the word "liable."

There is no difference in meaning between "shall be liable" and "may be liable." From mandatory liability a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature's use of the word "liable" in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only by avoiding the meaning of the word "liable" could the Gonzales court reach its contrary result.[3]

b. The linguistic differences in the other provisions of RCW 36.18.020(2) support Classen's interpretation that "shall be liable" does not impose a mandatory obligation

Classen's plain language interpretation is supported by the language of other provisions of RCW 36.18.020(2).

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[3] The Gonzales court also invoked the doctrine of legislative acquiescence, reasoning that because the legislature has not amended RCW 36.18.020, it must agree with Lundy. Gonzales, 198 Wn. App. at 155 n.4. This is not so. "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions . . . . We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." Jones v. Liberty Glass Co., 332 U.S. 524, 533-34, 68 S. Ct. 229, 92 L. Ed. 142 (1947); see also Helvering v. Reynolds, 313 U.S. 428, 432, 61 S. Ct. 971, 85 L. Ed. 1438 (1941) ("While [legislative acquiescence doctrine] is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.").

The beginning of the statutory subsection reads, "Clerks of superior courts shall collect the following fees for their official services," and then lists various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word "liable" or "liability." E.g., RCW 36.18.020(2)(a) ("In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . . ." (emphasis added)); RCW 36.18.020(2)(b) ("Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(c) ("For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(d) ("For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars." (emphasis added)); RCW 36.18.020(2)(e) ("For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(f) ("In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(g) ("For filing any petition to contest

a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars." (emphasis added)).

These other provisions of RCW 36.18.020(2), unlike RCW 36.18.020(2)(h), state a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. "Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word." Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) ("When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.").

The Gonzales decision conflicts with these cases and this canon of statutory interpretation. Because RCW 36.18.020(2)(h) contains the only provision in the statute where "liable" appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

c. RCW 10.46.190 provides that every person convicted of a crime "shall be liable to all the costs of the proceedings against him or her," yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

> Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime "shall be liable" for all the costs of the proceedings.

But, even though RCW 10.46.190 employs the same "shall be liable" language as RCW 36.18.020(2)(h), the legislature and the Washington Supreme Court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs "unless the defendant is or will be able to pay them." Our supreme court confirmed this in State v. Blazina, 182 Wn.2d 827, 838-39, 344 P.3d 680 (2015), holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary LFOs). Even though a defendant "shall be liable" for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature's

use of the phrase "shall be liable" does not impose a mandatory obligation but a contingent, waivable one. RCW 36.18.020(2)(h)'s criminal filing fee should likewise be interpreted as discretionary.

d. The legislature knows how to make legal financial obligations mandatory and chose not to do so with respect to the criminal filing fee

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA is recognized as a mandatory fee, given that it states, "When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). This statute is unambiguous in its command that the VPA shall be imposed.

The DNA collection fee is likewise unambiguous. It states, "Every sentence imposed for a crime specific in RCW 43.43.754[4] must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the legislature mandated a $100 DNA fee to be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. As discussed, it does not state that a criminal sentence "must include" the fee or that the fee "shall be imposed," but that the defendant is merely liable for the fee. Despite the fact

[4] RCW 43.43.754(1)(a) requires the collection of a biological sample from "[e]very adult or juvenile individual convicted of a felony . . . ."

that the legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, the legislature did not do so in this statute.

The Washington Supreme Court recently acknowledged as much in State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016), noting that RCW 36.18.020(2)(h)'s criminal filing fee had merely "been treated as mandatory by the Court of Appeals." That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction.

Given the contingent meaning of the word "liable," the Duncan court seemed to indicate that the meaning of the phrase "shall be liable" is, at best, ambiguous with respect to whether it imposes a mandatory obligation. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Classen's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2015).

e. Judicial notice is appropriate that not all superior courts agree the criminal filing fee is mandatory

Several counties, including Washington's most populous, King, waive the $200 criminal filing fee in every case.

Classen asks this court to take judicial notice of the variance in treatment of the criminal filing fee. "Judicial notice, of which courts may

take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). This court should consult any of the hundreds of judgments and sentences from criminal cases available in the Court of Appeals to establish that not all courts, counties, and judges agree that the $200 criminal filing fee is mandatory. Given the disparity, this court should not follow the Gonzales court's recent unanalyzed presumption that the criminal filing is a mandatory legal financial obligation.

f. To the extent he must argue *Lundy*, *Stoddard*, and *Gonzales* are incorrect and harmful for this court not to follow them, Classen so argues

Classen is mindful of the perplexing problem regarding the application of stare decisis among various divisions of the Court of Appeals, and appreciates the court's recent discussion of the issue in In re Personal Restraint of Arnold, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 1483993 (Apr. 25, 2017). Classen agrees with Judge Becker in Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015), and with Judge Siddoway in Arnold, 2017 WL 1483993, at *6-7 (Siddoway, J., concurring), that the "incorrect and harmful" standard does not apply in the Court of Appeals—panels within the same division or among the three divisions should feel unconstrained to disagree with each other given that disagreements are

oftentimes necessary, appropriate, and helpful to advance and explicate the law.[5] Nonetheless, to the extent Classen must argue that Gonzales, Stoddard, and Lundy are incorrect and harmful under the standard announced in In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), to persuade this court to disagree with these decisions, Classen so argues.

Gonzales, Stoddard, and Lundy are incorrect. None of the cases provides any reasoned statutory analysis nor addresses any of the arguments Classen advances here. Instead, the cases simplistically conclude that because the word "shall" appears in the statute, the criminal filing fee must be mandatory. This is not valid statutory interpretation but oversimplified shorthand intended to favor the imposition of this LFO. Gonzales, Stoddard, and Lundy were incorrectly decided.

These decisions are also harmful for all the reasons discussed in Blazina, where our supreme court recognized that "Washington's LFO system carries problematic consequences." 182 Wn.2d at 836. The court detailed the problem of a 12-percent interest rate imposed on even relatively

[5] As the Grisby court acknowledged, "if the first panel to decide an issue gets it wrong, the error would be perpetuated unless and until the Supreme Court took review . . . . [T]he existence of splits within the Court of Appeals [serves] the positive function of alerting the high court to unsettled areas of the law that are in need of review." Grisby, 190 Wn. App. at 810 (paraphrasing Mark DeForest, In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 GONZ. L. REV. 455, 504-05 (2012/13).

small amounts in LFOs, noting "a person who pays $25 per month toward their LFOs will owe the state more 10 years after conviction that they did when the LFOs were initially assessed." Id. at 836. This, in turn, "means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. This, in turn, "inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs." Id. at 837. "This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism." Id. (citations omitted). Because the Washington Supreme Court has documented the harms of Washington's LFO system, it is a forgone conclusion that case law requiring imposition of certain LFOs without a clear legislative mandate is harmful. Because Gonzales, Lundy, and Stoddard are incorrect and harmful, this court should not adhere to them.

Classen asks this court to hold that the criminal filing fee listed in RCW 36.18.020(2)(h) is not mandatory, may be waived, and that the trial court should consider a defendant's ability to pay the fee before imposing it.

D. CONCLUSION

Classen's actions underlying his kidnapping in the first degree and attempted kidnapping in the first degree convictions constituted one offense, violating the prohibitions on double jeopardy. Classen received ineffective assistance of counsel when his attorney failed to request a voluntary intoxication instruction. Classen received ineffective assistance of counsel when his attorney failed to request an appropriate lesser included offense instruction. The $200 criminal filing fee violates equal protection, was otherwise erroneously imposed, and should be vacated.

DATED this 30TH day of June, 2017.

Respectfully submitted,

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